UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

April 22, 2020 at 9:30 a.m.

1.	**18-27720-E-13** **DPC-3**	**DAVID RYNDA** **Tracy Wood**	**CONTINUED MOTION TO DISMISS CASE** **1-13-20 [256]**

Tentative Ruling: The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling.

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on January 13, 2020. By the court's calculation, 51 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Dismiss is xxxxx.

The Chapter 13 Trustee, David Cusick ("Trustee"), seeks dismissal of the case on the basis that:

1. The debtor, David Rynda ("Debtor"), is delinquent in plan payments.

2. Debtor has failed to file an amended plan and set it for confirmation.

On February 26, 2020, Trustee filed a Status Report admitting that the second ground for dismissal, that of no plan filed, was in error but requests the court to dismiss on delinquency grounds. Dckt. 262.

DISCUSSION

Debtor was, as of the Trustee's Declaration filed on March 17, 2020, $17,878.52, with another monthly payment of $2,470.52 due on March 25, 2020. Opposition and Declaration; Dckts. 268, 269. The regular monthly plan payment is $2,470.52. Failure to make plan payments is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

Questions of conversion or dismissal must be dealt with a thorough, two-step analysis: "[f]irst, it must be determined that there is 'cause' to act[;] [s]econd, once a determination of 'cause' has been made, a choice must be made between conversion and dismissal based on the 'best interests of the creditors and the estate.'" *Nelson v. Meyer (In re Nelson),* 343 B.R. 671, 675 (B.A.P. 9th Cir. 2006) (citing *Ho v. Dowell (In re Ho)*, 274 B.R. 867, 877 (B.A.P. 9th Cir. 2002)).

With respect to Chapter 13 cases, the Bankruptcy Code provides:

> [O]n request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause....

11 U.S.C. § 1307(c). The court engages in a "totality-of circumstances" test, weighing facts on a case by case basis in determining whether cause exists, and if so, whether conversion or dismissal is proper. *In re Love*, 957 F.2d 1350 (7th Cir. 1992). Bad faith is one of the general "for cause" grounds under 11 U.S.C. § 1307. *Nady v. DeFrantz (In re DeFrantz)*, 454 B.R. 108, 113 FN.4, (B.A.P. 9th Cir. 2011), citing *Leavitt v. Soto (In re Leavitt)*, 171 F.3d 1219, 1224 (9th Cir. 1999).

The major asset in this Bankruptcy Case is real property commonly known as 9436 Windrunner Lane, Elk Grove, California. On Schedule A/B Debtor states that it has a value of $399,334. The ownership of this Property is in dispute, with Elina Machado asserting an interest of at least 1/3 of the net proceeds from the sale of the Property.

The property is encumbered by the secured claims of PHH Mortgage Corporation (transferee of claim from Ocwen Loan Servicing, LLC), which was ($168,986.90), Proof of Claim No. 4-1, as of the

commencement of this case (with there being more than $20,000.00 of post petition unpaid amounts), and Lakeside Community Owners Association of ($22,871.00, plus post-petition interest), Proof of Claim No. 6-1.

Using the Debtor's valuation, there is potentially $185,000 of value in the Property for creditors, if the Debtor is the owner. That value has been diminishing as Debtor and Elina Machado have engaged in non-protective adversary proceeding litigation.

During this time, Debtor has defaulted on the Plan payments, which includes the payments for the current monthly mortgage payments and arrearage cure payments on the PHH Mortgage Corporation claim.

In the Adversary Proceeding with Elina Machado, Debtor has testified with respect to the Property:

> I am currently facing an emergency because eight unlawful tenants have entered my home, six of them without my permission, and are residing in my home as squatters since July 2019, and refuse to leave, and refuse to pay rent, claiming they do not need to pay rent because I am not the owner of the property.

19-2023; Declaration, p. 1:25.5-28.5, Dckt. 128.

> In the past few months I have filed two Unlawful Detainer complaints in Sacramento County Court, in pro per, against dead beat tenants and squatters that refuse to leave my home. The Unlawful Detainer judge checked the County records online and found Elina M. Machado and Gabriel Machado listed as the owners, refused to look at the copy of my quitclaim, nor my proof of bankruptcy filing, nor my complaint filed and pending in the bankruptcy court for quiet title, told me bankruptcy courts do not hear claims for quiet title, and told me until I come back with order for quiet title, he will not evict anyone for me.

Id., p. 2:1-7. Debtor does not indicate who is representing him, as the fiduciary of the bankruptcy estate, in acting to protect the Property, which is property of this bankruptcy estate.

> Without the ability to evict these non-paying tenants and squatters, and bring in two reliable tenants, I cannot afford to make my Chapter 13 Trustee's payment, and I have fallen behind over $15,000 on my payments, and the Trustee has filed a motion to dismiss my case set for hearing 03/04/2020.

Id., p. 2:11.5-14.5.

> In addition, these tenants are doing illegal drugs in my home, making it a filthy mess, they are very noisy, fighting, screaming and yelling at all hours of the night, and they often break into my room and garage and have stolen over $1,000 of property from me. Police have been called to my home several times due to theft and disturbance caused by these tenants.

Id., p. 2:19-22.

The Debtor and his counsel in this case, owing their respective duties to the bankruptcy estate, appear to have been "lost" in the State Court, allowing the Property, as property of the bankruptcy estate to be used for illegal drug use, fighting, screaming, and break-ins. Though this federal court has exclusive jurisdiction over property of the bankruptcy estate, 11 U.S.C. § 1334(e) (from which it may elect to abstain) and Congress has created a specific federal right for the Debtor, in exercising the powers and responsibilities of a bankruptcy trustee, to obtain possession of all property of the bankruptcy estate from third-parties, 11 U.S.C. § 542, Debtor has not sought to so do.

In an earlier Declaration in the Adversary Proceeding Debtor testified that he had taken eight (8) persons in as tenants in the Property. *Id.*; Declaration, p. 2:6-8, Dckt. 107.

In this bankruptcy case Debtor state under penalty of perjury that he granted to his brother on the eve of the bankruptcy filing (eleven days before filing) a deed of trust to secure an asserted obligation of $100,000 that dates back to ten years. Declaration, p. 3:24-27; Dckt. 119.

Debtor's brother, John Rynda, has filed a declaration in which he confirms under penalty of perjury that the "obligation" arises out of an attempt he made to provide funding to buy the Debtor's ex-wife's shares in the Debtor's insurance business in the ex-wife's bankruptcy case in 2009. Declaration, p. 2:5.5-14.5. John Rynda testified that he was the successful high bidder at $100,000.00. However, he was unable to time pay the $100,000 so the trustee conducted another auction and sold the shares to someone else. *Id.*, 2:16-20.

John Rynda, though unable to pay the $100,000.00, "sued for the unpaid contract," but "lost in court." He then had to pay the trustee the difference between the $100,000 he had contracted to pay and the trustee's legal fees, which John Rynda testifies was another $153,000. *Id.*, 2:21-25.

John Rynda's testimony corroborates that the obligation for which the deed of trust was recorded on the eve of the bankruptcy filing was a decade old.

The Plaintiff-Debtor has stuck in the court's face a textbook preference or fraudulent conveyance that may be avoided by a bankruptcy trustee or a Chapter 13 debtor who is responsible for exercising the duties, powers, and fiduciary responsibilities over property of the bankruptcy estate to avoid such preferences or fraudulent conveyances. 11 U.S.C. § 544, § 547, § 548, § 550.

The Status Conference is xxxxxxxxxx

APRIL 22, 2020 STATUS CONFERENCE

This Adversary Proceeding was commenced on February 11, 2019. In the past more than one year, the parties have appeared to struggle in this litigation. Defendant Elina Machado ("Defendant-Elina") sought to take the issue of determining whether the bankruptcy estate has an interest in the real property commonly known as 9436 Windrunner Lane, Elk Grove, California (the "Property") into her dissolution proceeding with co-Defendant Gabriel Machado ("Defendant-Gabriel") her ex (or soon to be ex) husband. Defendant-Gabriel has not responded to the Complaint and appears to be defaulting to the contentions of David Rynda, the Plaintiff-Debtor.

Plaintiff-Debtor has struggled for sixteen months in his Chapter 13 bankruptcy case (Bankr. E.D. Cal. 18-27720), unable to confirm a plan. As of the April 7, 2020 hearing on the motion to confirm a plan, the Chapter 13 Trustee reported that Plaintiff-Debtor's defaults on the proposed Chapter 13 Plan (which creditor payments consist of paying the lender creditor with a deed of trust recorded against the Property) total $20,000.00, which is eight months of plan payments in default.

Defendant-Machado at one point stated a concern that the Property needed to be marketed and sold, and the debt not be allowed to grow because the lender creditor's secured debt is a loan that she and Gabriel obtained and she did not want a foreclosure on her credit record (or further defaults in payments).

Plaintiff-Debtor has filed a series of motions for summary judgment. With each motion and further declaration by Plaintiff-Debtor, the situation becomes murkier. The court has stayed the hearing on the latest motion for summary judgment pending determination on the Chapter 13 Trustee's motion to dismiss or convert Plaintiff-Debtor's bankruptcy case. If dismissed, then there is no reason for this court to exercise federal court jurisdiction to determine the dispute, and the parties can go back to state court. If converted, then a Chapter 7 trustee will replace the Plaintiff-Debtor in this Adversary Proceeding, and the court will not burden the trustee with a ruling on a summary judgment motion on the eve of the case being converted. If not converted or dismissed, the Plaintiff-Debtor can continue in prosecution of this Adversary Proceeding and have the rights of the bankruptcy estate determined.

Over the past year-plus, the court has politely suggested, prodded, and recently outright stated that while the respective attorneys for Plaintiff-Debtor and for Defendant-Elina may be state court litigators, it is clear that they do not have a working knowledge of bankruptcy law or federal court litigation. The court reviews, for discussion with the parties and counsel, some of the most recently stated facts, positions, and issues identified by the parties.

First, in the bankruptcy case, Plaintiff-Debtor has stated under penalty of perjury that he granted to his brother on the eve of the bankruptcy filing (eleven days before filing) a deed of trust to secure an asserted obligation of $100,000 that dates back to ten years. The Plaintiff-Debtor has stuck in the court's face a textbook preference or fraudulent conveyance that may be avoided by a bankruptcy trustee or a Chapter 13 debtor who is responsible for exercising the duties, powers, and fiduciary responsibilities over property of the bankruptcy estate to avoid such preferences or fraudulent conveyances. 11 U.S.C. § 544, § 547, § 548, § 550.

Second, Plaintiff-Debtor asserts that title to the Property was deeded to him by Defendant-Elina and Defendant-Gabriel in 2015, but the original deed was stolen or lost, and not recorded. On the eve of bankruptcy, Plaintiff-Debtor recorded a copy of the purported deed, along with the various deeds of trust eleven days before his bankruptcy case was filed on December 12, 2018. In his Chapter 13 Plan, that has not been confirmed and for which he is in substantial monetary default, it provides that Plaintiff-Debtor will sell the Property - once he has prevailed in this Adversary Proceeding. Plaintiff-Debtor asserts that until that is done, he cannot sell the Property.

Counsel for Plaintiff-Debtor and counsel for Defendant-Elina have missed the ability of the federal court to order the sale of property free and clear of interests that are in *bona fide* dispute. 11 U.S.C. § 363(f)(4). Additionally, the court may order the sale of property in which the bankruptcy estate is a co-owner. 11 U.S.C. § 363(h).

In recent pleadings Debtor states that he cannot sell the Property before concluding the Adversary Proceeding because he needs to use the money to buy a replacement property. But if it is sold, even if all of the money is held in a blocked account, all of the money he would be paying toward interest on this debt would be freed up to pay rent pending resolution of the Adversary Proceeding. What Debtor could not do would be to live "free," not pay rent, as is now happening in the bankruptcy case with the $20,000 in plan payment defaults (those payments to be made to the lender creditor) and just let the debt secured by the Property grow.

Third, that application of Judicial Estoppel precludes Defendant-Elina from asserting any interest in the Property. Plaintiff-Debtor asserts that Defendant-Elina did not disclose the interest in the Property that she now asserts when she filed bankruptcy in 2015, and therefore is judicially estopped from asserting it now against Plaintiff-Debtor. Motion for Summary Judgment, p. 9:11-26. Plaintiff-Debtor cites to the 1905 decision in *Bank of Jacksboro v. Laster*, 196 U.S. 115 (1905), under the Bankruptcy Act in effect at that time.

Plaintiff-Debtor does not address the application of judicial estoppel in this setting, as it applies to Plaintiff-Debtor seeking to obtain a judgment saying he has title to the Property. Looking to a more recent case, the Supreme Court has stated that the exercise of judicial estoppel is to protect the integrity of the judicial process, not to be used to the advantage of one party over another. *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001). While stating that the courts have observed that circumstances when judicial estoppel is appropriate cannot be reduced to any general formation of principle:

> [s]everal factors typically inform the decision whether to apply the doctrine in a particular case: First, a party's later position must be "clearly inconsistent" with its earlier position. *United States v. Hook*, 195 F.3d 299, 306 (CA7 1999); *Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 206 (CA5

> 1999); *Hossaini v. Western Mo. Medical Center*, 140 F.3d 1140, 1143 (CA8 1998); *Maharaj v. Bankamerica Corp.*, 128 F.3d 94, 98 (CA2 1997). Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled," *Edwards*, 690 F.2d at 599. Absent success in a prior proceeding, a party's later inconsistent position introduces no "risk of inconsistent court determinations," *United States v. C. I. T. Constr. Inc.*, 944 F.2d 253, 259 (CA5 1991), and thus poses little threat to judicial integrity. *See Hook*, 195 F.3d at 306; *Maharaj*, 128 F.3d at 98; *Konstantinidis*, 626 F.2d at 939. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *See Davis*, 156 U.S. at 689; *Philadelphia, W., & B. R. Co. v. Howard*, 54 U.S. 307, 13 HOW 307, 335-337, 14 L. Ed. 157 (1852); *Scarano*, 203 F.2d at 513 (judicial estoppel forbids use of "intentional self-contradiction . . . as a means of obtaining unfair advantage"); *see also* 18 Wright § 4477, p. 782.
>
> In enumerating these factors, we do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations may inform the doctrine's application in specific factual contexts. In this case, we simply observe that the factors above firmly tip the balance of equities in favor of barring New Hampshire's present complaint.

Id. at 750-751.

In the bankruptcy context, Judicial Estoppel has been applied to prevent a debtor from failing to disclose an asset in a bankruptcy case, and then later seek to assert that asset, usually a cause of action, against a third-party.

It is not asserted that Defendant-Elina did not disclose that she asserted that she owned the Property, but:

> 29. Defendant filed a Chapter 13 bankruptcy petition, Case No. 15-21423, on 2/25/2015, in the Eastern District of California Bankruptcy Court, and fraudulently claimed she owned and resided in the property she had sold by quitclaim to Plaintiff on 11/22/2014. In addition, Defendant did not list in her schedules any claims against Plaintiff. Therefore, Defendant's affirmative defenses and counter claims are barred by judicial estoppel.

Motion, p. 9:22-26; Dckt. 121.

Plaintiff-Debtor's argument is not that Defendant-Elina has taken inconsistent positions to abuse the federal judicial process - such as not disclosing that she had an interest in the Property in her bankruptcy case and now assert that she has such prior undisclosed interest. Rather, Plaintiff-Debtor states that Judicial Estoppel should apply because she was consistent in claiming at the time of the bankruptcy case to have owned the Property and now claims to own the Property.

Plaintiff-Debtor is correct that it may not have been accurate for Defendant-Elina to state that

she resided in the Property, if, as Plaintiff-Debtor asserts the court determines that the Property was permanently sold to Plaintiff-Debtor. But that can be determined only after the trial in this Adversary Proceeding. If anything, Defendant-Elina would be "guilty" of overstating an interest for creditors to consider whether the trustee should liquidate the Property.

Plaintiff-Debtor also asserts the issue that Defendant-Elina did not list any claims against Plaintiff-Debtor by which she has the right to claim any or all of the Property, so she should be Judicially Estopped from asserting them. As this court addressed in the tentative ruling on the Motion for Summary judgment, such rights are a subset of, and lesser interest included in the interest that Defendant-Elina listed in her bankruptcy case. With respect to the other claims, such as for waste, the issue exists as to whether such claims existed prior to or after Defendant-Elina filed bankruptcy.

Economics of the Litigation
and Asserted Rights

Turning to Defendant-Elina, her Declaration filed on March 19, 2020, indicates that the economics of dispute may well not have warranted the years of litigation - first in the State Court and now here in the federal court. With respect to her asserted right to the Property, she states under penalty of perjury (identified by the paragraph number in the Declaration, paraphrased by the court, unless set out with "quotation marks"):

> 2. Defendant-Elina moved away from the Property in late 2014.
>
> 4. At some time after late 2014, Defendant-Elina and Gabriel met with Plaintiff-Debtor, for Plaintiff-Debtor to help them address the Property while the two of them were going through their divorce.
>
> Plaintiff-Debtor was to move into the Property, and Plaintiff-Debtor was to pay all mortgage, taxes, insurance and homeowner dues while living in the Property. Plaintiff-Debtor was to allow Gabriel (who worked for Plaintiff-Debtor) to live in the Property rent free.
>
> After a year, the Property was to be sold and the "parties would divide the profits."
>
> 7. Whatever document that Defendant-Elina signed, it was with the "agreement" that the property would be sold and the profits divided between the three of them a year later. The documents were signed in November 2014.
>
> 9. Defendant-Elina received notices that the utilities, homeowners association dues, and the mortgage were not being timely paid or not being paid.
>
> 10. In 2016 Plaintiff-Debtor told Defendant-Elina that the Property was his and he would not sell it, and that there would be no dividing of profits.

As testified by Defendant-Elina, the "deal" was that she was to get one-third of the profits after Plaintiff-Debtor sold the Property.

As mentioned above, Defendant-Gabriel has not appeared in this Adversary Proceeding and is not contesting Plaintiff-Debtor's assertion that the Property is Plaintiff-Debtor's.

The loan obtained by Defendant-Elina and Gabriel that is secured by the Property is stated to have been $168,986 as stated for the Creditor, PHH Mortgage (the current assignee of the Claim), as of the commencement of this case. 18-27720; Proof of Claim 4-1. Proof of Claim No. 4-1 states that the pre-petition arrearage was $21,753.56.

In addition, the Lakeside Community Homeowners Association ("Lakeside HOA") filed Proof of Claim No. 6-1 for $22,871.97, asserting it is secured by the Property. Lakeside HOA asserts in Proof of Claim No. 6-1 that the Property had a value, as of the commencement of this case, of $453,285. The interest rate on Claim No. 6-1 is asserted to be 12% per annum.

On Schedule A/B, Debtor (under penalty of perjury) is not as bullish as Lakeside HOA, and states that the Property has a value of $399,334. Dckt. 12 at 3.

Using a value of $425,000, splitting the difference, one can construct an economic comparison of what the parties could have expected from resolving their dispute shortly after the case is filed, what it is now, and how the situation gets better or worse going forward.

Computation as of Commencement of Case		Computation as of Now	
$425,000	FMV	$425,000	
($34,000)	Costs of Sale at 8% (real estate commission, escrow fees, prorated taxes, and assuming no repairs by seller required)	($34,000)	
($168,986)	PPH Mortgage	($188,986)	(includes defaulted payments under plan)
($22,872)	Lakeside HOA	($28,361)	(includes 2 years of 12% interest)
			(The above does not include any post-petition costs, fees, and expenses that the creditors may assert the right to recover.)

$199,142	Projected Net Proceeds to Fight Over	$173,653	
$66,381	One-Third of Projected Net Proceeds	$57,884	

For Defendant-Elina, it appears that her best case would have been to recover $66,381 for a third of the net. But that would be only if she were to prevail.

With the passage of time, and without taking into account the attorney's fees, costs, and emotional expense, Defendant-Elina's best case would appear to be $57,884, a decrease of 13%.

For the Plaintiff-Debtor, rather than just a third like Defendant-Elina would get (under her best case scenario), in light of Gabriel not contesting Plaintiff-Debtor's contention, he could be claiming 2/3's of the proceeds, walking away with double what Defendant-Elina claims was "the deal." But the Plaintiff-Debtor not only needs to get the default entered, but get a judgment fixing everyone's rights.

Thus, Plaintiff-Debtor's proceeds appeared to have been $127,760 when the case was filed, and now it has dropped to $115,768.

With each passing day the value drops for each party as the mortgage goes unpaid, as HOA dues do not get paid, and property taxes are not paid (if the mortgage and HOA dues are not being paid, it is unlikely that the property taxes are being paid, decreasing the net monies even more as time goes by, including the 18% interest on those secured property taxes).

Defendant-Elina and Plaintiff-Debtor have now placed themselves in the virus infested, COVID-19 environment for whichever of them is the "winner" and has to sell the property. It may be that in this environment the CARES Act allowing for an interest/penalty free forbearance, it may be that some of the continuing losses may be arrested.

At the April 23, 2020 Status Conference, **xxxxxxxxxx**

3. **18-27720-E-13 DAVID RYNDA** **CONTINUED MOTION FOR SUMMARY**
19-2023 TLW-8 Tracy Wood **JUDGMENT**
RYNDA V. MACHADO ET AL **2-22-20 [121]**

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant, Chapter 13 Trustee, and Office of the United States Trustee on March 11, 2020 By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

The Motion for Summary Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Summary Judgment is xxxxxxxx.

David Rynda, the Debtor-Plaintiff, has filed and noticed for hearing a Motion for Summary Judgment in this Adversary Proceeding. The core dispute in this Adversary Proceeding is the ownership of real property commonly known as 9436 Windrunner Lane, Elk Grove, California (the "Property"). Plaintiff-Debtor asserts that he is the owner of the Property based on a copy of a lost (or he speculates stolen) quitclaim deed ("Quitclaim") which was never recorded. Defendant Elina Machado ("Defendant-Elina") asserts that while she signed the Quitclaim, it was not intended to transfer full title to Plaintiff-Debtor. Rather, due to the financial and marital challenges facing her and her soon to be ex-spouse Gabriel Machado ("Defendant-Gabriel"), Plaintiff-Debtor was to care for the Property for a year (pay the mortgage, taxes, HOA fees, utilities, and maintenance), after which the Property would be sold and the profits divided between Plaintiff-Debtor, Defendant-Elina, and Defendant-Gabriel. Defendant-Elina asserts that Plaintiff-Debtor has not abided by those agreed (not in writing) terms.

REVIEW OF MOTION

Plaintiff-Debtor begins his Motion outlining a section titled "Undisputed Facts." However, as discussed below, these "facts" are a combination of facts, legal conclusions, legal authorities, and arguments. Defendant-Elina has responded to them as if they were a separate statement of undisputed facts. The court outlines the undisputed facts (identified by the paragraph number for it in the Motion) and the Defendant's response to set forth what are the agreed undisputed material facts.

1. Defendant-Elina and Defendant-Gabriel (collectively "Defendants") are individuals who reside in Sacramento, California, and the acts and real property at issue occurred and are located in Sacramento County.

    a. Response - Admit as to Defendant-Elina.

2. On November 22, 2014, Defendants executed and had notarized a Quitclaim [Deed] for the Property. A copy of the Quitclaim is filed as Exhibit A with the Motion.

    a. Response - Admit that the document was executed by Defendants and notarized, deny the balance. Assert need to conduct discovery regarding Exhibit A.

3. The Quitclaim is notarized by Lucerito Meza-Baez. A copy of the notarization is filed as Exhibit B with the Motion.

    a. Response - Admit, and assert need to conduct discovery regarding authenticity of Exhibit B.

4. The Defendants, and each of their, signatures and right thumb prints appear in the notary journal of Lucerito Meza-Baez. A copy of the notary journal page is filed as Exhibit C with the Motion.

    a. Response - Admit that document was executed by Defendants and notarized. Deny balance and assert need to conduct discovery on authenticity of Exhibit C.

5. The Quitclaim states that the Defendants are the grantors and for consideration in the amount of $10.00 "and other [not specified] good and valuable consideration," that the property is quitclaimed to Plaintiff-Debtor.

    a. Response - Admit, plus there are other statements in the Quitclaim.

6. Property Description from Quitclaim

    a. Response - Admit.

7. Defendant Machado's attorney admitted in court that Defendant-Elina signed the Quitclaim and gave it to Plaintiff-Debtor.

    a. Response - Deny, assert discovery required regarding Exhibit A.

8. In her Answer, Defendant-Elina admitted the facts stated in Paragraphs 2,3, and 4 above, which are Paragraphs 2, 3, and 4 of the Complaint, thereby admitting that she signed and had notarized the Quitclaim to sell the Property to Plaintiff.

    a. Response - Deny.

9. Defendant-Elina's refusal to admit that she signed the Quitclaim is evidence that Defendant-

Elina is: (1) dishonest, (2) is playing games to drag out her meritless claim and bankruptcy of the Plaintiff-Debtor (who voluntarily filed his Chapter 13 bankruptcy case).

a. Response - Deny.

10. Plaintiff-Debtor "admits" receiving the original Quitclaim from Defendant and that he accepted it.

a. Response - Deny.

11. Defendant asserts in the Answer that she did not deliver the Quitclaim with an intent to convey her interest in the Property. Plaintiff-Debtor then posits that if she did not intend to convey her interest was her intent to defraud Plaintiff-Debtor? Plaintiff-Debtor then asserts that the court should infer that she had an intention to convey her interest in the Property. (This request for an inference appears to show that this is not an undisputed fact.)

a. Response - Admit that Defendant-Elina did not deliver Quitclaim with intent to transfer her interest in the Property; and Deny balance.

12. There are six elements to prove a valid conveyance, consisting of: (1) identity, (2) consideration, (3) words of conveyance, (4) land description, (5) signature, and (6) delivery. (This "fact" appears to be a legal assertion of applicable law, without citation.)

a. Response - None.

Declaration of Plaintiff-Debtor

Plaintiff-Debtor has provided his non-expert witness, personal knowledge testimony in his Declaration (Dckt. 123). Fed. R. Evid. 601, 602. This personal knowledge testimony, including the following stated under penalty of perjury (identified by paragraph number used in the Declaration).

¶ 7: Plaintiff-Debtor opines as to what he testifies to be admissions by Defendant-Elina in her Answer.

¶ 9: Plaintiff-Debtor's testimony that he concludes that Defendant-Elina's denial based on lack of sufficient knowledge establishes that she is dishonest.

¶ 13. Plaintiff-Debtor testifies as to the six elements required by law to prove a valid conveyance.

¶ 14. Plaintiff-Debtor testifies as to the legal requirement for identity for a conveyance.

¶ 15. Plaintiff-Debtor testifies as to the legal requirement for consideration.

¶ 16. Plaintiff-Debtor testifies that the lost Quitclaim is an admission.

¶ 17. Plaintiff-Debtor testifies as to the legal requirements for "words of conveyance."

The Declaration continues, with the paragraphs being renumbered beginning on page 6.

¶ 4. Plaintiff-Debtor testifies as to the legal requirement for a description of what is being conveyed.

¶ 5. Plaintiff-Debtor repeats his testimony that the lost Quitclaim is an admission by Defendant-Elina.

¶ 6. Plaintiff-Debtor testifies as to the legal requirements for a signature.

¶ 8. Plaintiff-Debtor testifies as to the legal requirement for "delivery and acceptance."

¶ 15. Plaintiff-Debtor provide his testimony and legal conclusion that "that all elements of a valid conveyance are met," and then further his legal determination that he is the "owner of the property."

¶ 20. Plaintiff-Debtor provides his legal conclusions that Defendant-Elina's claims are without merit, and his conclusion that Defendant-Elina has "no legal or equity right, claim, or interest in said property."

¶ 21. Plaintiff-Debtor then testifies to his legal conclusion that all of Defendant-Elina's Counter-Claims are "barred by at least five Affirmative Defenses."

The Declaration continues, with Plaintiff-Debtor providing his personal knowledge testimony of the various affirmative defenses. This includes Plaintiff-Debtor quoting the various California Civil Code sections (misidentifying exactly the same way as they are stated to be Civil Code sections in the Motion) relating to the statute of limitations and quoting and providing his legal conclusions as to the Statute of Frauds.

It is clear that much of the "Declaration" is merely the cut and paste of the legal points and authorities, and legal arguments made by Plaintiff's Debtor's counsel into the Declaration which Plaintiff-Debtor has signed under penalty of perjury.

OPPOSITION

Defendant-Elina has filed her Opposition to the Motion. Dckt. 136. The Opposition begins with asserting that the Motion does not state a basis for summary judgment on grounds asserted in the Amended Complaint, but based on "necessity" to allow Plaintiff-Debtor to evict squatters. Defendant-Elina asserts that Plaintiff Debtor has failed to meet his burden of establishing that there are no material facts in dispute.

Defendant-Elina asserts that she is the legal title holder, and that Plaintiff-Debtor must prosecute an action to enforce whatever equitable rights he asserts he has over the Property. Absent his enforcing those rights, he cannot attempt to "quiet title" as against the legal title holder.

With respect to asserting a right by adverse possession, Defendant-Elina asserts that the litigation over this property commenced in June 2017, well before the expiration of a five year period of adverse possession would have expired.

With respect to the Quitclaim, Defendant-Elina asserts that it was not delivered with the intent to transfer title, and that mere physical delivery of the Quitclaim is not sufficient to transfer the Property to Plaintiff-Debtor.

Declaration of Defendant-Elina

Defendant-Elina has provided her Declaration in opposition to the Motion. Dckt. 137. With respect to the Quitclaim and Plaintiff-Debtor obtaining possession, Defendant-Elina's testimony (identified by the paragraph number in the Declaration) includes:

> 4. Gabriel then approached me and said that his friend David Rynda could "help us" and that I needed to hear him out. . . To the best of my recollection David told me that he wanted to "help us." . . . he offered to move into the Real Property to live and that he would pay all mortgage, taxes insurance and the home owners association dues while our divorced finalized and that Gabriel would be able to stay there without making payments. David stated that after a year the home would be sold and that the parties would divide the profits.
>
> 6. I have reviewed the quitclaim deed that David Rynda has provided the court and I simply do not recall this specific document and I do not know whether this is the document that I signed . . . .
>
> 7. Whatever document I did sign at David Rynda's office was signed with my agreement that the home would be sold and the profits divided as stated above. It was never my intent to transfer title or ownership of the Real Property to David Rynda. At the time I signed the document I fully expected and intended David Rynda to pay the mortgage, insurance, taxes and associations dues and that after a year we would sell and divide profits, not that I would transfer ownership to Rynda. . . .
>
> 8. I am informed and believe that David Rynda moved into the property with Gabriel in early 2015. Gabriel and David Rynda occupied the property together since that time until approximately 2017.
>
> 10. The constant late bill notifications continued for months and I waited for the year to pass as it was my expectation that the home would be sold. Despite my continuous requests to Mr. Rynda and Gabriel Machado to move forward with the sale of the home nothing happened.
>
> 11. In approximately 2016 I confronted David Rynda about not moving forward with the sale and he for the first time told me that the house was his and that he

would not sell it and divide profits as we agreed. David and Gabriel had a falling out over this, and I realized that David had no intention of complying with his agreement or leaving the Real Property.

12. In May, 2017 I filed for divorce. As part of the divorce proceedings I moved to join David Rynda as a person who controlled and claimed an interest in a community asset that was subject to the disposition of the family court. See California Family Code 2021.

13. David Rynda was joined in the family law proceeding and served with summons and petition. David Rynda never responded to service of process and his default was taken. Attached as Exhibit A is the petition for joinder that was filed on June 1, 2017 asking the family law court to determine the respective rights of the parties with regard to the Real Property and pursuant to the parties' agreement.

14. After the court granted me relief to sell the Real Property and deposit funds in my attorney's trust account, David Rynda filed for bankruptcy relief and this adversary proceeding followed.

The referenced Pleading on Joinder, filed as Exhibit A (Dckt. 138) has a file stamped date of June 1, 2017. It was filed in Defendant-Elina's State Court Dissolution Action. The Joinder names Plaintiff-Defendant and seeks a determination of their competing claims to the Property. The factual statements in the Joinder concerning the Property are consistent with the Declaration filed by Defendant-Elina in this Adversary Proceeding.

REVIEW OF ASSERTED
KNOCK OUT AFFIRMATIVE DEFENSES
AGAINST THE COUNTER-CLAIMS

Plaintiff-Debtor and his counsel strongly assert that Defendant-Elina should be thrown from the courthouse, her claims and contentions being without merit. In doing so, rather than providing clear, legal authorities and analysis, they speculate that Defendant-Elina is a liar, a schemer, not clever, and makes unsupported "legal" conclusions.

The court now reviews the "Knock Out" Affirmative Defenses as stated by Plaintiff-Debtor, consider the legal authority they and Defendant-Elina cite, and fill in the "legal cracks" they have left.

For a First Affirmative Defense Plaintiff Debtor states that oral agreements are barred by the California Statute of Frauds, Civil Code § 1624. Plaintiff-Debtor then quotes California Civil Code § 1624(3) stating "An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein; such an agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent is in writing, subscribed by the party sought to be charged."

However, the testimony by Defendant-Elina is that the deal between Defendant-Elina and Plaintiff-Debtor was for the $10 and "other valuable consideration" (which is also cited by Plaintiff-Debtor in presenting the Quitclaim to the court in support of his arguments). It appears that the "additional consideration" could include that Plaintiff-Debtor would live in, pay the mortgage for; pay the taxes, insurance and HOA fees for, and maintain the Property; Defendant-Gabriel could continue to live in the

Property rent free; and then after a year the property would be sold and the net proceeds divided equally between Plaintiff-Debtor, Defendant-Elina, and Defendant-Gabriel.

Defendant-Elina argues that at the end of the year, she asserted a right to one-third of the proceeds from the sale of the Property, but Plaintiff-Debtor refused to recognize her interest in proceeds and refused to sell the Property. Whether an agreement to share the profits from the sale of real estate is within the Statue of Fraud is addressed in 1 Witkin Summary of California Law, Contracts § 387, which states:

> [§ 387] In General.
> In applying this provision, the following distinctions and exceptions should be noted:
>
> (1) An agreement to share the profits of a sale of real estate is not within the statute [of frauds]. (*Dutton v. Interstate Inv. Corp.* (1941) 19 C.2d 65, 70, 119 P.2d 138 [agreement construed to give profits under an oil lease rather than a fractional interest in the oil produced].)

The California Supreme Court in *Dutton v. Interstate Inv. Corp.*, 19 Cal. 2d 65, 69-70 (1941), discusses the difference between an agreement to proceeds from real property and transferring interests in real property, stating:

> Under the facts of the present case, however, as disclosed by the pleadings and by the findings of the trial court, the agreement did not contemplate that plaintiff was to receive a one-third interest in the oil and gas produced under the lease. The agreement was that he was to receive one-third of the net profits ultimately realized by the Interstate Investment Corporation, and that is the effect of the judgment rendered by the trial court. **Such an agreement to share the profits from a transaction involving real estate is not required to be in writing.** (*Arnold v. Humphrey*, 138 Cal. App. 637; *see Koyer v. Willmon*, 150 Cal. 785; *Sly v. Abbott*, 89 Cal. App. 209, 216; Restatement, Contracts, sec. 193.)
>
> Appellant next urges that the failure to have the agreement in writing violated the statutory requirement that agreements which are not to be performed within a year must be in writing. (Civ. Code, sec. 1624 (1); Code Civ. Proc., sec. 1973 (1).) Assuming that the agreement in the present case falls within this provision of the statute of frauds, **the finding of the trial court that Dutton had fully performed all of his obligations under the contract operates to remove the bar of the statute**. (*Dougherty v. California Kettleman Oil Royalties, Inc.*, 9 Cal. (2d) 58, 81; *Hellings v. Wright*, 29 Cal. App. 649, 656; Restatement, Contracts, sec. 198; 2 Williston, Contracts (Rev. ed. 1936), sec. 504, p. 1471.)

In *Dutton*, the California Supreme Court cited to *Dougherty v. California Kettlemen Oil Royalties, Inc.*, noting that an oral agreement for a portion of the monies generated from the property (under an oil lease) did not need to be in writing. Further, though the agreement was oral, so long as the person seeking to enforce it had completed his/her performance within one year, and it would take the other person longer to perform their part of the agreement, it was not barred by the Statute of Frauds, with the other party still to perform being estopped from asserting the Statute of Frauds. *Dougherty v. California Kettlemen Oil Royalties, Inc.*, 9 Cal. (2d) 58, 81 (1937).

In 2019 the California Court of Appeal addressed this issue of whether the statute of frauds applied to an oral contract, concluding that if the promisee has fully performed within a year, then they do not violate the Statute of Frauds, even if the other party is to perform beyond one year.

> With regard to oral contracts that fall within the statute of frauds category of contracts not to be performed within a year, we hold that **the promisee's full performance of all of his or her obligations under the contract takes the contract out of the statute of frauds,** and no further showing of estoppel is required. We distinguish cases involving other categories of contracts within the statute of frauds, such as contracts to make a will or contracts not to be performed within the promisor's lifetime, because those categories of contracts historically have been treated differently than contracts not to be performed within a year. Therefore, we conclude that to the extent those cases hold that avoidance of the statute of frauds requires the promisee to satisfy the elements of estoppel—showing extraordinary services by the promisee or unjust enrichment by the promisor—they do not apply to the category of contracts not to be performed within a year.

Zakk v. Diesel, 33 Cal. App. 5th 431, 433 (2019).

This is also discussed in Witkin Summary of California Law, which states:

> [§ 371] Exception for Complete Performance on One Side.
>
> (1) In General. Where the contract is unilateral, or, though originally bilateral, **has been fully performed by one party, the remaining promise is taken out of the statute, and the party who performed may enforce it against the other**. *(See Dutton v. Interstate Inv. Corp.* (1941) 19 C.2d 65, 70, 119 P.2d 138; *Dean v. Davis* (1946) 73 C.A.2d 166, 168, 166 P.2d 15; *Roberts v. Wachter* (1951) 104 C.A.2d 271, 280, 231 P.2d 534; *Bergin v. Van der Steen* (1951) 107 C.A.2d 8, 19, 236 P.2d 613*; Nesson v. Moes* (1963) 215 C.A.2d 655, 656, 30 C.R. 428, citing the text; *Blaustein v. Burton* (1970) 9 C.A.3d 161, 185, 88 C.R. 319, citing the text; Rest.2d, Contracts § 130(2), and Comment d; 4 Corbin (Rev. ed.), § 19.14; 9 Williston 4th (2011 ed.), § 24:14; 6 A.L.R.2d 1053 [performance as taking contract not to be performed within 1 year out of statute of frauds].)

1 Witkin Sum. Cal. Law Contracts § 371

The Deed says there is "other consideration" received. One would question whether such "other consideration" could include the division of the profits from a future sale.

From the evidence presented by Plaintiff-Debtor and Defendant-Elina are that Defendant-Elina's part of the deal was done with the November 22, 2014 Quitclaim signed by Defendant-Elina. If the court were to determine that a deal existed for the sale of the Property by Plaintiff-Debtor and the profits divided after a year - in approximately December 2015, performance was to be done by Plaintiff-Debtor by December 2015.

Plaintiff-Debtor then asserts that California Civil Code § 339 providing for a two year statute of limitations years applies and bars any relief for Defendant-Elina. It is asserted that the counterclaims filed on November 16, 2019, are barred by Civil Code § 339. Additionally, it is asserted that the affirmative defenses based on such oral contracts are also barred.

The applicable statute of limitations is found in California Code of Civil Procedure § 339, which Plaintiff-Debtor did accurate quote. The portion of this statute relied upon is that which states that the time period for commencing an "action upon a contract, obligation or liability not founded on Section 2725 of the Commercial Code or subdivision 2 of Section 337[1] of this code, . . .", other than for the recovery of real property (Cal. C.C.P. § 335) must be commenced within two years.

This is asserted to relate to the counterclaims and affirmative defenses asserted by Defendant-Elina. The Motion does not address any specific counterclaim or affirmative defense, but makes the blanket conclusion that all are barred.

The court begins by first identifying the affirmative defenses stated by Defendant-Elina. Then the court will review the applicable law, including case authority and learned treatises, to evaluate Plaintiff-Debtor's blanket conclusion.

With respect to Affirmative Defenses asserted by Defendant-Elina, these are summarized below, with one column identifying those that do not appear to relate to an oral contract, and the other column for those that could colorably relate to something not in writing. (Though Plaintiff-Debtor has made the blanket assertion that all are subject to the two year statute of limitations in the Code of Civil Procedure). Defendant-Elina has laid out a blanket of twenty four affirmative defenses, which appear in large part to state the name of the affirmative defense, but offer little more.[2]

---

[1] California Commercial Code § 2725 provides for a four year statute of limitations for a breach of a contract to sell goods.

California Code of Civil Procedure § 337(b) provides a four year statute of limitations for a book account.

[2] As discussed in 2 Moore's Federal Practice - Civil § 8.08, it is commonly understood that an affirmative defense only need be "stated," and not set out with the same minimal plausibility requirements for claims in the complaint as set out by the U.S. Supreme court in the *Twombly* line of cases. However, the only Circuit Court of Appeals addressing the issue has recently concluded that the *Twombly* minimum pleading requirements also apply to affirmative defenses under Federal Rule of Civil Procedure 8, but applied with "less rigor." *See GEOMC Co. v. Calmare Therapeutics Inc.*, 918 F.3d 92, 98 (2d Cir. 2019).

Non Oral Contract Affirmative Defense	**Colorable Oral Contract As Part of Affirmative Defense**
First Affirmative Defense "The Complaint fails to state facts sufficient to state a cause of action."	None
Second Affirmative Defense "Plaintiff had a duty to mitigate, minimize, or prevent damages, if any there were, and he has failed and refused to do so."	
Third Affirmative Defense "The allegations in the Complaint are barred by the doctrine of equitable estoppel."	
Fourth Affirmative Defense "The allegations in the Complaint are barred by the doctrine of waiver."	
Fifth Affirmative Defense "The allegations in the Complaint are barred by the doctrine of laches."	
Sixth Affirmative Defense "The acts, omissions, losses and damages of which Plaintiff complains were caused solely by other persons or entities over which this answering Defendant had no control."	
Seventh Affirmative Defense "The quitclaim deed, if any there was, is defective and therefore invalid as not it does not contain the legal formalities required of a quitclaim deed."	
Eighth Affirmative Defense "The quitclaim deed, if any there was, is defective and therefore invalid as it was not delivered by Defendant and accepted by Plaintiff with the requisite intent to transfer the real property."	
Ninth Affirmative Defense "The contract claim, if any there was, as alleged in the complaint fails for lack of adequate consideration."	
Tenth Affirmative Defense "The contract claim, if any there was, as alleged in the complaint fails as there was never a meeting of the minds between the parties as alleged in the complaint."	
Eleventh Affirmative Defense "The allegations in the Complaint are barred by the applicable statute of limitations including but not limited to California Code of Civil Procedure 318, 337, 339 and other applicable laws."	

Twelfth Affirmative Defense "The allegations in the Complaint are barred by the doctrine of Res Judicata (Issue Preclusion and/ or Claim Preclusion)."	
Thirteenth Affirmative Defense "The contract claim, if any there was, as alleged in the complaint fails to comply with the California Statute of Frauds Civil Code 1624."	
Fourteenth Affirmative Defense "The contract claim, if any there was, as alleged in the complaint fails for lack of performance."	
Fifteenth Affirmative Defense "The quit claim deed, if any there was, as alleged in the complaint was procured by duress."	
Sixteenth Affirmative Defense "The quit claim deed, if any there was, as alleged in the complaint was procured by fraud.	
Seventeenth Affirmative Defense "The quit claim deed, if any there was, as alleged in the complaint was procured by fraud." (Duplicating the Sixteenth Affirmative Defense.)	
Eighteenth Affirmative Defense "The allegations in the complaint fails to state a cause of action as this action is brought under the provisions of California Code of Civil Procedure sections 760.010 through 765.060, but the complaint fails to comply with the requirements of those provisions."	
Nineteenth Affirmative Defense "The allegations in the complaint fail to state a cause of action as California Law prohibits an equitable interest holder to proceed in quiet title against a legal title holder."	
Twentieth Affirmative Defense "The allegations in the complaint fail as California Code of Civil Procedure sections 760.010 through 765.060 require that all Defendants with an interest in the real property be named but the complaint fails to name necessary Defendants under that section and Federal Rules of Civil Procedure Rule 19 (a)(1) specifically lien holders John Rynda, Erika Leyva, Ocwen and the US Department of Housing and Urban Development."	
Twenty First Affirmative Defense "The claim of adverse possession as alleged in the complaint, if any there was, fails because Defendant Gabriel Machado was in possession of the real property until approximately late 2017 during a time when he was lawful owner and title holder."	

Twenty Second Affirmative Defense "The claim of adverse possession as alleged in the complaint, if any there was, fails because Defendant Gabriel Machado was in possession of the real property and based on information and belief paid, at least in part for the mortgage, taxes and insurance on the real property until approximately late 2017 during a time when he was lawful owner and legal title holder."	
Twenty Third Affirmative Defense "The claim of adverse possession as alleged in the complaint, if any there was, fails because Plaintiff's possession was at all times mentioned in the complaint permissive in nature only."	
Twenty Fourth Affirmative Defense "The claim of adverse possession as alleged in the complaint, if any there was, fails because Defendant ELINA MACHADO asserted her right to ownership prior to any right arising in Plaintiff including but not limited to filing legal actions to determine rights to the property, filing notices of pending action against the real property, paying assessments on the real property that Plaintiff failed or refused to pay and asserting her rights including in this pleading that she is the rightful owner of the real property and that Plaintiff's possession and use of the real property is merely permissive.	

Reviewing the above, Plaintiff-Debtor has not shown that the defenses are barred by California Code of Civil Procedure § 337, and summary judgment thereon is denied.

The court has also been presented with the Joinder in the Dissolution Action by which Defendant-Elina sought a determination of the respective rights of Defendant-Elina, Defendant-Gabriel, and Plaintiff-Debtor. That was filed on June 1, 2017. That is within two years of the December 2015 performance by Plaintiff-Debtor of the agreed sale and division of the profits. Thus, it appears that if the proceedings in this court would present a procedural barrier to the adjudication of the Parties rights and interests, the court could allow the matter to proceed in state court.

Review of Counter-Claims

Moving to the Counter-Claims asserted by Defendant-Elina, the first is stated to be for waste alleged to have been committed by Plaintiff-Debtor on the Property. This does not appear to state a cause of action based on oral contract.

The Second Counter-Claim is not stated against Plaintiff-Debtor, but against various third-parties who are not parties to this Adversary Proceeding, not have been named as counter-defendants, and are not subject to having their rights adjudicated in this Adversary Proceeding.

The Third Counter-Claim states it is for Declaratory Relief, seeking a determination whether Defendant-Elina or Plaintiff-Debtor, as between the two or them, is obligated to pay specified obligations. Though Defendant-Elina incorrectly cites to the California Code of Civil Procedure as the basis for seeking a federal court issuing a declaratory relief judgment, rather than the applicable federal law, 28 U.S.C.

§ 2201, Plaintiff-Debtor has not shown how a declaration of the respective rights is barred by California Code of Civil Procedure § 337.

The Fourth Counter-Claim is to Quiet Title as between Defendant-Elina's asserted right to title and Plaintiff-Debtor's asserted right to title. This Counter-Claim merely restates Plaintiff-Debtor's Third Amended Complaint to quiet title as between the competing claims of Plaintiff-Debtor and Defendant-Elina. Third Amd. Cmpt., Dckt. 72.

Cal Civ. Proc. § 337
Statute of Limitations - Written Contract

For his Third Affirmative Defense basis for summary judgment, in the title Plaintiff-Debtor asserts that the California Civil Code § 337 four year statute of limitations for written contracts bars the affirmative defenses and counterclaims. As with the asserted two year statute of limitations above, it is not a California Civil Code provision. California Code of Civil Procedure § 337 states that there is a four year statute of limitations for actions on a contract, obligation, or liability on an instrument in writing, except as provided in California Code of Civil Procedure § 336a. Cal. C.C.P. § 337(a).[3]

Plaintiff-Debtor asserts that more than four years passed after the unrecorded, lost quitclaim, that Plaintiff-Debtor asserts his interest in the Property, was signed on November 22, 2014, when Defendant-Elina filed the Counter Claim on November 16, 2019. While more than four years passed from when the quitclaim was signed, Plaintiff-Debtor does not provide the court with the date from which the statute of limitations, such as when the alleged cause of action accrued. This asserted grounds for summary judgment fails.

Judicial Estoppel

Plaintiff-Debtor asserts that Defendant-Elina did not disclose her asserted rights against the lost Quitclaim interest by which Plaintiff-Debtor asserts his rights, in her 2015 bankruptcy case, and therefore she is judicially estopped from attempting to assert any interest against Plaintiff-Debtor. Plaintiff-Debtor cites the 1905 decision of Judicial Estoppel and how it applied under the Bankruptcy Act of 1891. The basic principle addressed in the quote cited in the Motion is from *First Nat'l Bank v. Lasater*, 196 U.S. 115, 119 (1905), which is:

> It cannot be that a bankrupt, by omitting to schedule and withholding from his trustee all knowledge of certain property, can, after his estate in bankruptcy has been finally closed up, immediately thereafter assert title to the property on the ground that the trustee had never taken any action in respect to it. If the claim was of value (as certainly this claim was according to the judgment below) it was something to which the creditors were entitled, and this bankrupt could not, by withholding knowledge of its existence, obtain a release from his debts and still assert title to the property.

The Ninth Circuit Court of Appeals in *Ah Quin v. County of Kauai DOT*, 733 F.3d 267 (9th Cir. 2013), considered the application of Judicial Estoppel in the bankruptcy setting. In describing Judicial Estoppel as more recently stated by the Supreme Court, the Ninth Circuit begins with a discussion that

[3] California Code of Civil Procedure § 336a provides the definition of a "book account."

Judicial Estoppel is to "protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment," citing :*New Hampshire v. Maine*, 532 U.S. 742, 750 (2001). *Ah Quin v. County of Kauai DOT*, 733 F.3d at 270.

The Circuit continues, recognizing that Judicial Estoppel is not "reducible to any general formulation of principle," there are several factors typically considered: (1) parties later position must be clearly inconsistent with the earlier position; (2) whether the presentation of the position to the court in the prior proceeding would result in it appearing that either the prior court or the one in the subsequent proceeding was misled; and (3) whether the inconsistent position would give the person an unfair advantage or present an unfair detriment to the opposing party. *Id.*

The Ninth Circuit then discussed the application in bankruptcy and the disclosure of assets by a debtor.

> In the bankruptcy context, the federal courts have developed a basic default rule: If a plaintiff-debtor omits a pending (or soon-to-be-filed) lawsuit from the bankruptcy schedules and obtains a discharge (or plan confirmation), judicial estoppel bars the action. *See, e.g., Payless Wholesale Distribs., Inc. v. Alberto Culver (P.R.) Inc.*, 989 F.2d 570, 571 (1st Cir. 1993) ("Conceal your claims; get rid of your creditors on the cheap, and start over with a bundle of rights. This is a palpable fraud that the court will not tolerate, even passively."); *Hay v. First Interstate Bank of Kalispell, N.A.*, 978 F.2d 555, 557 (9th Cir. 1992) (holding that "[f]ailure to give the required notice [to the bankruptcy court] estops [the plaintiff-debtor] and justifies the grant of summary judgment to the defendants"). The reason is that the plaintiff-debtor represented in the bankruptcy case that no claim existed, so he or she is estopped from representing in the lawsuit that a claim does exist.

Id. at 271. However, the court also considers whether the failure to list an asset was due to mistake or inadvertence, and whether the bankruptcy estate was afforded the opportunity to administer the asset (such as the bankruptcy case being reopened). *Id.* at 273. Additionally, the application of Judicial Estoppel is not to result in a "bonus" to a person who would be liable on the rights or interests at issue. *Id.* at 275-276.

As the law developed through the 20th Century and now in the 21st Century, the law now in effect (originally enacted in 1978 and amended several times since), Congress provides that any and all rights, claims, and other property of a debtor automatically become property of the bankruptcy estate when a case is filed. 11 U.S.C. § 541(a)[4].

Defendant-Elina's Bankruptcy Case

Defendant-Elina commenced her bankruptcy case on February 25, 2015, seeking relief under Chapter 13 of the Bankruptcy Code. Bankr. E.D. Cal. No. 15-21423. Defendant-Elina did confirm a Chapter 13 Plan in her case and began making payments into that Plan. However, Defendant-Elina defaulted on plan payments, and her Chapter 13 bankruptcy case was dismissed on September 9, 2016.

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[4] Certain statutory exceptions are stated in 11 U.S.C. § 541(b), none of which would be relevant to Defendant-Elina's ownership of, interest, or asserted right to the Property.

As will be discussed below, Defendant-Elina listed the Property on her bankruptcy schedules and provided for paying the claim secured by the Property through her Chapter 13 Plan. On Defendant-Elina's bankruptcy Petition she listed her state address as the Property. 15-21423; Dckt. 1 at 1. On Schedule A Debtor listed the Property, stated that her interest in the Property was "Husband and Wife," that the Property had a value of $295,000 and was encumbered by an obligation in the amount of ($168,284.00). *Id.*, Dckt. 14 at 15.

On Schedule C Defendant-Elina claimed a $100,000 homestead exemption in the Property pursuant to California Code of Civil Procedure § 704.730(a)(2). *Id.* at 19, and Amended Schedule C, Dckt. 25. On Schedule D Defendant-Elina listed Ocwen Loan Servicing, LLC as having a claim in the amount of ($162,961.00) that was secured by the Property. *Id.* at 21.

Defendant-Elina's Chapter 13 Plan provided for her to make $2,080.00 in monthly plan payments, of which $1,280.42 went to pay the current mortgage payment and $102.00 (beginning in the eight month of the Plan) was paid to a pre-petition arrearage of ($6,067.00) on the Ocwen Loan Servicing claim secured by the Property. *Id.*, Dckt. 12, and Order Confirming, Dckt. 30.

Defendant-Elina paid $31,260.00 in plan payments. *Id.*; Trustee Motion to Dismiss, Dckt. 65. This represents fifteen (15) months of payments. The Trustee's Final Report states that $22,698.36 for the current monthly mortgage payments and $4,026.24 were paid to Ocwen Loan Servicing, LLC for its claim secured by the Property. *Id.*; Dckt. 78 at 2-3.

Defendant-Elina's dismissed Chapter 13 case was closed on November 14, 2016.

Consideration of Judicial Estoppel

In contending that Judicial Estoppel should apply, Plaintiff-Debtor argues not that Defendant-Elina did not disclose an interest in the Property, but asserts that she falsely told the bankruptcy trustee that she had more of an interest than she should have asserted. The Plaintiff-Debtor states in the Motion:

> Defendant filed a Chapter 13 bankruptcy petition, Case No. 15-21423, on 2/25/2015, in the Eastern District of California Bankruptcy Court, and fraudulently claimed she owned and resided in the property she had sold by quitclaim to Plaintiff on 11/22/2014. In addition, Defendant did not list in her schedules any claims against Plaintiff. Therefore, Defendant's affirmative defenses and counter claims are barred by judicial estoppel.

Motion, p. 9:22-26; Dckt. 121.

Thus, Plaintiff-Debtor admits that Defendant-Elina disclosed the Property, stating that she owned it. Plaintiff-Debtor states that this is "fraudulent" since he had the lost Quitclaim. Plaintiff-Debtor then asserts that her interests with respect to the Property, if any, were other "claims against the Plaintiff" which were not disclosed.

Plaintiff-Debtor filed an additional pleading in response to the court's posted tentative decision for the April 2, 2020 hearing. Plaintiff-Debtor Supplemental Pleading, Dckt. 146. In the Plaintiff-Debtor Supplemental Pleading, he takes exception to the court noting that Defendant-Elina stated in her bankruptcy case the entire Property, not a partial interest or claim to assert, and therefore it did not appear that Judicial

Estoppel would apply. In that Supplemental Pleading the Plaintiff-Debtor, without the citation to any legal authority, makes the following legal argument:

> 5. The court presumes that because Defendant Machado listed Debtor's home as her own in her Chapter 13 it proves that Debtor believed the home to be her own at that time of filing. On the contrary, the fact she listed the home as her own simply indicates her bankruptcy attorney advised her that a debtor cannot file a chapter 13 for a home that is not debtor's primary residence. Chapter 13 is not permitted for second residences, and no equity in a second residence can be exempted in a Chapter 13, nor Chapter 7. Therefore, debtor's attorney likely advised debtor she must claim she resides in Debtor's home, or her bankruptcy will not be able to exempt any equity in that property, and a plan cannot be confirmed for a property that is not her primary residence. That is why the home was listed as her primary residence, and it does not prove she believed the residence to belong to her."
> . . .
> 8. Defendant Machado was clever enough to list the home she sold to Debtor as her primary residence, when she did not live in the home, this simply proves she lied to the court, not that she believed the home hers.
>
> 9. However, Defendant Machado was not clever enough to list any claims against Debtor on her schedules. This alone should be the death knell of her claims. Therefore, the claims she asserts now are barred by Judicial Estoppel, a well-established doctrine in bankruptcy cited in debtor's motion.

Id., ¶¶ 5, 8, 9.

Beginning with paragraph 5, the court does not "presume" what Debtor believed, but only that Debtor disclosed the Property and as far as the trustee and creditors in the Chapter 13 case were concerned it was the entire Property that was in the bankruptcy estate for the trustee to administer, such as to sell. She disclosed that there was this asset, including all subparts thereof.

In the Plaintiff-Debtor Supplemental Pleading, the Plaintiff-Debtor then further makes the following statement of bankruptcy law:

> [a] debtor cannot file a chapter 13 for a home that is not debtor's primary residence. Chapter 13 is not permitted for second residences, and no equity in a second residence can be exempted in a Chapter 13, nor Chapter 7.

The above statements made by Plaintiff-Debtor are not "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law. . . ." Fed. R. Bankr. P. 9011(b)(2). They are blatantly wrong.

First, a debtor does not file a bankruptcy "for a home." Debtors file bankruptcy. All of their property - primary residence, second home at Lake Tahoe, oil and gas interests in Texas wells, and the like - go into the bankruptcy estate. All of the debts, including those secured by the property of the debtor, are included in the bankruptcy case.

Second, with respect to claiming exemptions, an exemption may be claimed in a primary

residence (commonly the homestead exemption, California Code of Civil Procedure § 704.710 et seq.) or claimed in other real property, such as a second home (when using the California Code of Civil Procedure § 703.140 optional bankruptcy exemptions, which includes the $25,485 (current amount) wildcard exemption that may be claimed in any asset). Thus, the statement of law that exemptions cannot be claimed in second homes is wrong.

Third, in a Chapter 13 case, the ability of a debtor to reduce the claims secured by a primary residence and having liens stripped off such property, is restricted. 11 U.S.C. § 1322(b)(2). However, there is no such limit on the ability to strip debt off of real property that is not the primary residence, reducing those secured obligations to only the actual value of the non-primary residence property.

Fourth, Plaintiff-Debtor's statement that "a plan cannot be confirmed for a property that is not Defendant-Elina's primary residence" is clearly wrong. Plaintiff-Debtor offers no legal authority for the proposition that if a debtor owns real property other than her residence that she could not confirm a Chapter 13 plan or that the debt secured by the non-primary residence property cannot be dealt with in the Chapter 13 plan. Plaintiff-Debtor does not offer legal support for such statement because no legal authority exists for that statement.

In Paragraph 8 of the Plaintiff-Debtor Supplemental Pleading, Plaintiff-Debtor states that Defendant-Elina lied to the court, because Plaintiff-Debtor asserts that he purchased the Property pursuant to the lost Quitclaim for $10 and "other consideration." What Defendant-Elina did was state that she and her then husband owned the Property, and not merely a claim to get the Property based on the interest that Plaintiff-Debtor asserts based on a lost, unrecorded Quitclaim, Defendant-Debtor. For purposes of her bankruptcy case, Defendant-Elina asserted that she owned the Property, including all of it in her bankruptcy case.

Also, during her Chapter 13 case, Defendant-Elina made payments totaling $22,698.36 for fifteen months of current mortgage payments and an additional $4,026.24 for an arrearage on the obligation owed to Ocwen Loan Servicing, LLC for the claim secured by the Property. There is nothing in the Trustee's Final Report or other documents filed in Defendant-Elina's Chapter 13 case that the payments were refused by Ocwen Loan Servicing, LLC because the current mortgage payments were being paid by someone else (such as Plaintiff-Debtor) or that it was receiving double payments.

With respect to the Property and Defendant-Elina's interest in it, the Property and the greatest interest possible was disclosed. Defendant-Elina's position now that the property was not transferred to Plaintiff-Debtor or that she was entitled to one-third of the sales proceeds is not inconsistent with her listing the Property in her bankruptcy case. The bankruptcy estate, and creditors in her case, had a superior right and interest in the property to Plaintiff-Debtor with the unrecorded Quitclaim - *see* 11 U.S.C. § 544(a)(3).

Second, asserting that she owned the Property in the bankruptcy case and asserting in this case that the Quitclaim was not intended to transfer the Property to Plaintiff-Debtor are not inconsistent. Defendant-Elina, now that the bankruptcy case has been dismissed and the superior right to the Property pursuant to 11 U.S.C. § 544(a)(3) not being applicable, is not inconsistent with Defendant-Elina stating that an interest of a lesser value based on an agreement for proceeds from the sale of the Property.

Third, disclosing the full interest in the bankruptcy case and now stating that there is an agreement for the sale of the Property does not give her an unfair advantage over Plaintiff-Debtor or impose on Plaintiff-Debtor unfair detriment. The position now being asserted by Defendant-Elina is advantageous

to Plaintiff-Debtor.

Judicial Estoppel does not apply to bar Defendant-Elina from asserting her ownership of, or the lesser right to proceeds from the sale of, the Property.

As to the Counter-Claim asserted against the Plaintiff-Debtor, the first is for waste done or caused by Plaintiff-Debtor on the Property. If such waste were for conduct of Plaintiff-Debtor prior to February 22, 2015, there may be an issue if there was an obligation that could be subject to Judicial Estoppel.

The Third Counter-Claim states it is for Declaratory Relief, seeking a determination whether Defendant-Elina or Plaintiff-Debtor, as between the two or them, is obligated to pay specified obligations. Such an adjudication and declaration of their respective obligations is not barred by Judicial Estoppel.

The Fourth Counter-Claim is to Quiet Title as between Defendant-Elina's asserted right to title and Plaintiff-Debtor's asserted right to title. This is the right to the Property that Defendant-Elina listed on Schedule A when she filed bankruptcy. Judicial Estoppel does not apply to bar Defendant-Elina asserting her asserted right to the Property that she disclosed on her Schedule A.

The request for application of Judicial Estoppel by summary judgment is denied.

CONCLUSION

The court has been presented with an Adversary Proceeding in which there are a number of material facts in *bona fide* dispute. The resolution of most will require the court to assess the credibility of the witnesses. In addition, Plaintiff-Debtor has not presented the court with any purely legal defenses upon which partial summary judgment may properly be granted.

The court also determines that so many of the facts are in dispute and can be determined only upon consideration of the conflicting evidence and determining the credibility of the testimony, there are no material facts to be determined as not in dispute by this Motion.

4. **18-27720-E-13 TLW-5** **DAVID RYNDA** **Tracy Wood** **CONTINUED MOTION TO CONFIRM PLAN** **5-21-19 [213]**

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on May 22, 2019. By the court's calculation, 69 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

The Motion to Confirm the Amended Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

The Motion to Confirm the Amended Plan is xxxxx.

REVIEW OF THE MOTION

The debtor, David Jerome Rynda ("Debtor"), seeks confirmation of the Amended Plan. The Amended Plan provides for payments of $1,987.00 for 1 month, $2,197.19 for 1 month, and $2,470.52 for 58 months. Amended Plan, Dckt. 216. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

On September 16, 2019, the Debtor filed an Addendum to the 8th Amended Plan. Dckt. 245. This Addendum states:

> In the event debtor wins his quiet title complaint for 9436 Windrunner Lane, Elk Grove, CA 95758, against Elina Machado and Gabriel Machado, in adversary proceeding, case number 19-2023.
>
> Once debtor obtains an order for quiet title he will record the order and list the property for sale at fair market value with a licensed real estate broker and sell the property as soon as he receives an offer from a qualified buyer for at least 90% of the

appraised value, and he will pay off the mortgages on the property which are in the names of Elina and Gabriel Machado, and any utility liens placed on the property for utility services received by debtor during his ownership.

In the event debtor loses his quiet title complaint, debtor will vacate the premises within 60 days and turn the keys over to Elina Machado.

The plan, as stated in the Addendum, requires the sale of the real property at dispute with Elina Machado (Gabriel Machado not answering or otherwise opposing the relief sought by Debtor in the Adversary Proceeding).

CHAPTER 13 TRUSTEE'S OPPOSITION

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition on July 9, 2019. Dckt. 225. Trustee argues Debtor is $1,814.35 delinquent in plan payments under the proposed plan, and notes that the plan contains a summary of state court litigation in the additional provisions.

Trustee's March 17, 2020 Opposition

On March 17, Trustee filed an Opposition. Dckt. 268. Trustee opposes confirmation on the basis that:

A. Debtor has been delinquent in plan payments since August 2019.

B. Debtor's proposed Plan referenced litigation and Debtor must clarify the status of the litigation before the court can determine the feasibility of the plan.

C. Debtor's proposed Plan calls for the sale of property if Debtor prevails on title, but does not provide a date for the sale or whether the mortgages will continue to be paid until the sale occurs.

The Chapter 13 Trustee reported that the Debtor is more than $20,000 in default in plan payments. With monthly plan payments of $2,479.52, as of the April 7, 2020 hearing, Debtor was in default for eight months.

MACHADO'S OPPOSITION

Elina Machado filed an Opposition on July 16, 2019. Dckt. 228. Machado argues:

1. Debtor is delinquent in plan payments.

2. Debtor includes a statement regarding litigation in the plan.

3. The plan was not proposed in good faith because it does not provide specific courses of action in the event Debtor loses or wins in the dispute of ownership of real property.

4. Debtor is paying the claims of Erika Leyva and John Rynda $100.00 monthly.

DISCUSSION

The Chapter 13 Trustee asserts that Debtor is now $20,000.00 delinquent in plan payments, which represents eight months of the $2,470.52 plan payment. According to the Chapter 13 Trustee, the Plan in § 2.01 calls for payments to be received by the Chapter 13 Trustee not later than the twenty-fifth day of each month beginning the month after the order for relief under Chapter 13. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

The court has raised, in the hearings on motions to avoid the lien of David Hicks, that creditors Erika Leyva and John Rynda had liens recorded on the eve of bankruptcy. Such secured claims would appear to be fraudulent conveyances or preferential transfers that the Chapter 13 Debtor has the fiduciary duty of a trustee to avoid for the benefit of the bankruptcy estate and creditors pursuant to 11 U.S.C. §§ 547 and 548.

In this case Debtor has testified under penalty of perjury with respect to the deed of trust he granted his brother eleven days before this bankruptcy case was filed:

> My brother paid over $100,000 to help me with a situation that occurred ten years ago, and I owe him more than that for his help, therefore, as soon as I found a way to record my name on the title of my home by attaching a copy of my quitclaim received from the Machados to a conveyance from me to my living trust. I also recorded with that a Declaration of Homestead, and a lien to secure the debt I owe my brother.

Declaration, p. 5:24-27,4:1.5; Dckt. 119.

The Deed of Trust given to Debtor's brother for the obligation ten years before the bankruptcy case was filed is Exhibit D, Dckt. 123. Though testifying the obligation occurred ten years earlier, the Deed of Trust states that the indebtedness is evidenced by a promissory note of the same date as the Deed of Trust in the amount of $100,000. Deed of Trust, ¶ 1.3; *Id.*

The Deed of Trust has a Recorder's stamp date of November 30, 2018 at 2:08:48 p.m. The Deed of Trust is dated November 30, 2018 and a notary acknowledgment of the same date.

It appears that Debtor has documented either a voidable fraudulent conveyance (11 U.S.C. § 548, § 544) or a preference, if there was an enforceable obligation actually owed (11 U.S.C. § 547). While the Debtor has been candid about the obligation, he cannot choose to favor his family members over other creditors once he has filed bankruptcy. The Debtor must exercise the fiduciary duties and powers to properly recover all monies and assets for the bankruptcy estate, even if that means recovering it from his brother.

Debtor's plan makes no such provision, and though being in bankruptcy now for sixteen (16) months, neither he nor his counsel, both who owe duties to the bankruptcy estate to enforce its rights and recovery property for the estate, have taken any action to recover this purported transfer.

With respect to the obligation for which Erika Leyva was given a deed of trust against the

Property, Debtor testified that she made a $10,000 and a $15,000 loan to Debtor. These debts appear to be asserted to have arisen sometime in the four years prior to the filing of the bankruptcy case. The Erika Leyva Deed of Trust for a $10,000 obligation is Exhibit E, has a recorder stamp date of November 30, 2018 at 2:09:47 p.m.. Dckt. 124 at 2-6. Exhibit F is an Erika Leyva Deed of Trust for a $15,000 obligation, with a recording stamp date of November 30, 2018 at 2:08:48 p.m. Dckt. 125 at 2-6.

These two eve of bankruptcy recorded deeds of trust raise the same 11 U.S.C. § 544, § 548, and § 547 issues, and obligations on the Debtor and Debtor's counsel to prosecute for the bankruptcy estate.

Proposed Plan

Though unable to make the Plan payments for eight months, Debtor has allowed the defaults to multiply. In connection with the Adversary Proceeding, the Debtor has argued that he is helpless to move forward and sell the Property until the time he gets a final judgment quieting title in his favor. Then, as provided in this plan, he will then sell the Property.

Elina Machado has argued that she wants the property sold, the debt that is in her name secured by the property paid, and have her rights determined. Machado seems equally stymied in moving her interests forward.

It appears that both the Debtor and Machado, and their respective counsel, have not considered 11 U.S.C. § 363(b), § 363(f), and § 363(h) that allows the federal court to order the sale of property in which the bankruptcy estate asserts an interest, that can be sold free and clear of any interest that is in bona fide dispute, and sell property in which the bankruptcy estate and another have an interest. Congress providing for the federal courts to have exclusive jurisdiction over property of the bankruptcy estate, including determining what is property of the bankruptcy estate (unless the federal court decides to abstain to have the issue determined in another court), the sale of the Property before conclusion of the Adversary Proceeding would be a simple task for two parties in a good faith bona fide dispute seeking to maximize the recovery obtained from the property.

In recent pleadings Debtor states that he cannot sell the Property before concluding the Adversary Proceeding because he needs to use the money to buy a replacement property. But if it is sold, even if all of the money is held in a blocked account, all of the money he would be paying toward interest on this debt would be freed up to pay rent pending resolution of the Adversary Proceeding.

Delayed Sale Terms

One argument made at some point in time in this case by Machado is that she wants the property sold, the debts paid, and not have these obligations she is personally liable on "hanging on out there." It appears that Debtor and Machado could substantially reduce the areas of dispute by proceeding to immediately sell the property rather than waiting until after the litigation is completed and see if Debtor wins. 11 U.S.C. § 363(f) allows for the sale of property free and clear of an interest other than the bankruptcy estate when that other interest is the subject of *bona fide* dispute.

The Chapter 13 Plan requires the Debtor to make the current monthly payment and an arrearage payment on the Class 1 claim secured by the Property that is the subject of the litigation with Machado. Debtor has not made at least eight months of such payments.

Post-Petition Payment of Claim Against Debtor

In looking through the Docket the court noted that David Hicks, a creditor, filed a Satisfaction of Claim, stating that Proof of Claim No. 7 had been satisfied in full "by a corporate co-debtor." Proof of Claim No. 7-1 was filed on February 15, 2019, which states under penalty of perjury that David Hicks is the creditor. The claim is stated to be in the amount of $104,250.38, and it is secured by an abstract of judgment. The unidentified property securing this claim is stated to have a value of $104,250.38. Questions 1, 7, 9; Proof of Claim 7-1.

Attachment 1 to Proof of Claim 7-1 is an Abstract of Judgment with a Recorder's stamp date of December 15, 2015 (3 years before the bankruptcy case was filed). Mr. Hicks is not shown as the judgment creditor, and a Carlina Rynda is identified as the "Petitioner."

The Abstract of Judgment identifies an Additional Judgment Debtor, which is stated to be: "Rynda's #1 Insurance Services, Inc.," with David Rynda identified as the agent for service of process. It appears that Rynda's #1 Insurance Services, Inc. is the corporate co-debtor with more than $100,000 to pay Mr. Hicks in February 2019, after this bankruptcy case was filed.

On the Statement of Financial Affairs Debtor lists being an owner of a business, Rynda's No. 1 Insurance Services, Inc., which he stated has existed from "December 1995 to present." Statement of Financial Affairs Question 27; Dckt. 51 at 7. In the section to describe the nature of the business it states, "Insurance Broker. Debtor is former owner." *Id.* This is inconsistent with saying that the period in which his business has existed is 1995 to present.

Erika Leyva is identified as the "accountant or bookkeeper" for the Debtor's business.

In response to Question 18 on the Statement of Financial Affairs, Debtor states that he did not sell, trade, or otherwise transfer any property to anyone, other than in the ordinary course of business in the two (2) years before filing bankruptcy. Two years before filing this case would be December 12, 2016. *Id.* at 5.

April 22, 2020 Hearing

At the April 22 hearing, Debtor reported to the court, **XXXXXXXXXX**